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IN THE

SUPREME COURT OF THE UNITED STATES

_____TERM, A. D. 1954

NO._____

QUALITY EGG SHIPPERS, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

NO._____

HERMAN GROSS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

TO THE HONORABLE EARL C. WARREN, CHIEF JUSTICE OF THE UNITED STATES AND THE

ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioners, QUALITY EGG SHIPPERS, INC., a corporation, and HERMAN GROSS, respectfully petition this Honorable Court for a writ of certiorari to review a judgment and opinion of the Court of Appeals for the Eighth Circuit, rendered in this cause on April 23, 1954.

I. SUMMARY OF STATEMENT OF THE MATTER INVOLVED

The petitioners were indicted in the United States District Court for the Northern District of Iowa, Western Division, on January 12, 1953, for violating Section 491, Title 7 of the United States Code. The indictment was in two counts and charged that the petitioners knowingly and with intent to defraud fail truly and correctly to account for eggs shipped in interstate commerce by one Richard Swalve, doing business as Swalve Produce Company, George, Lyon County, Iowa. It was charged in said indictment that the eggs were received for and on behalf of the said Richard Swalve, doing business as Swalve Products Company, and said indictment appeared as follows:

Indictment.

(Filed in U. S. District Court on January 12, 1953)
United States District Court for the Northern District of Iowa, Western Division.
United States of America, Plaintiff,
No. 4215 vs. Criminal

Quality Egg Shippers, Inc. and Herman Gross, Defendants.
The Grand Jury Charges:

Count I.

That Quality Egg Shippers, Inc., a corporation, and Herman Gross, on or about February 26, 1952, having received in interstate commerce from and for and on behalf of Richard Swalve, doing business as Swalve Produce Company, of George, Iowa, a quantity of eggs, to wit, 524 cases of eggs, a poultry and perishable farm product, shipped by the said Richard Swalve, doing business as Swalve Produce Company, from George, Lyon County, in the Western Division of the Northern District of Iowa, to Miami, in the State of Florida, in violation of Section 491, Title 7, United States Code, did knowingly and with intent to defraud fail truly and correctly to account for said eggs to the said Richard Swalve, doing business as Swalve Produce Company, at said Town of George, Iowa.

Count II.

That Quality Egg Shippers, Inc., a corporation, and Herman Gross, on or about March 4, 1952, having received in interstate commerce from and for and on behalf of Richard Swalve, doing business as Swalve Produce Company, a quantity of eggs, to wit, 562 cases of eggs, a poultry and perishable farm product, shipped by the said Richard Swalve, doing business as Swalve Produce Company, from George, Lyon County, in the Western Division of the Northern District of Iowa, to Miami, in the State of Florida, in violation of Section 491, Title 7, United States Code, did konwingly and with intent to defraud fail truly and correctly to account for said eggs to the said Richard Swalve,

doing business as Swalve Produce Company, at said Town of George, Iowa.

A True Bill.

CECIL F. BEERS,
Foreman.

MICHAEL L. MASON,
United States Attorney.

The petitioners entered their plea of not guilty (R.P. 2) and on April 13, 1953, a jury trial was commenced at Sioux City, Iowa, Judge William F. Riley presiding (R.P. 2).

The jury entered a verdict of guilty as to both petitioners on both counts. (R.P. 60 & 61.)

The court denied petitioners' motion for judgment of acquittal at the conclusion of the case for the plaintiff (R.P. 3); and denied petitioners' motion for judgment of acquittal at the culmination of all of the evidence (R.P. 46). Thereafter petitioners' motion for acquittal and motion for a new trial were both denied (R.P. 62), judgment was entered against both petitioners on both counts on the 25th day of June, 1953 (R.P. 63-66).

The petitioners filed their appeal in the United States Court of Appeals for the Eighth Circuit, and said judgment was affirmed on April 23, 1954 (R.P. 84). A dissenting opinion was filed by the Chief Judge of the United States Court of Appeals for the Eighth Circuit (R.P. 84-88).

The principal question involved on said appeal was whether the transactions constituted a sale by the prosecuting witness or whether an agency existed by and between the prosecuting witness and the petitioners (R.P. 81).

No re-hearing was prayer for and none granted.

The basic questions involved in the appeal were the application of the Iowa statutes in the Iowa courts' judicial decision thereunder and the proper application of the basic law and the decisions by the United Sttaes District Court for the Northern District of Iowa and the United States Court of Appeals for the Eighth Circuit.

II. JURISDICTIONAL STATEMENT.

The statutory provision believed to sustain the jurisdiction of this Court is Section 1254 of Title 28 of the United States Code.

The date of the judgment sought to be reviewed is June 25, 1953; the date of filing this application for certiorari is June 22, 1954, additional time having been granted the petitioners by the Honorable Associate Justice Tom C. Clark by his order entered the 20th day of May, 1954.

III. QUESTION PRESENTED.

The question in this case is whether the United States District Court for the Northern District of Iowa and the United States of Court of Appeals for the Eighth Circuit correctly construed, interpreted and applied Section

554.19.2 of the Code of Iowa, and the applicable decisions of the Iowa courts thereunder, in determining the petitioners' status as agents or purchasers under Section 491, Title 7, United States Code.

IV. REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The decision of the Court of Appeals determining the existence of an agency clearly is contrary to the applicable Iowa statutes and the Iowa courts' interpretation of said statutes.

2. It appears from the dissenting opinion of Chief Justice Gardner that the appellate tribunal permitted the trial court, i.e. the United States District Court for the Northern District of Iowa, to utilize its jurisdiction in a criminal proceedings to recover a civil debt by a prosecuting witness. Such departure from the accepted and usual course of jurisdictional proceedings cals for the exercise of this Court's power of supervision.

WHEREFORE your petitioners pray that a writ of certiorari issue under the seal of this Court directed to the Court of Appeals for the Eighth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court had in the case numbered and entitled on its docket, No. 14,892 Criminal, Quality Egg Shippers, Inc., Appellant, vs. United States of America, Appellee, and No. 14,893 Criminal, Herman Gross, Appellant, vs. United States of America, Appellee, to the end as provided for by the statutes of the United States; and that the judgment

herein of said Circuit Court be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated June 22, 1954.

_____Attorney for Petitioners

STATE OF FLORIDA
COUNTY OF DADE

Before me, the undersigned authority, personally appeared IRVING M. WOLFF, who after being duly sworn, deposes and says that he is counsel for the petitioners, Quality Egg Shippers, Inc. and Herman Gross, and that he has read the foregoing Petition for Writ of Certiorari, and that he is fully familiar with the contents of said Petition and that the statements contained therein and the facts as set forth therein are true, and that he knows of said truth by his own knowledge.

_____

IRVING M. WOLFF

Sworn to and subscribed before me
this _____ day of June, 1954.

_____

Notary Public, State of Florida
My Commission expires: Jan. 30, 1956.

SUPREME COURT OF THE UNITED STATES

_____TERM, A. D. 1954

NO._____

QUALITY EGG SHIPPERS, INC.,
Petitioner, Appellant-Defendant Below.
vs.
UNITED STATES OF AMERICA,
Respondent-Appellee Below.

NO._____

HERMAN GROSS,
Petitioner, Appellant-Defendant Below.
vs.
UNITED STATES OF AMERICA,
Respondent-Appellee Below.

BRIEF OF PETITIONERS-APPELLANTS

I. OPINIONS OF COURT BELOW.

The opinion in the United States Court of Appeals for the Eighth Circuit (R.P. 79-88) is reported in_____ _____ Federal 2d_____.

II. JURISDICTION.

1. The date of the judgment to be reviewed is June 25, 1953 (R.P. 63-66).

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Section 1254, Title 28, United States Code.

3. The question in this case is whether the United States District Court for the Northern District of Iowa and the United States Court of Appeals for the Eighth Circuit construed, interpreted and applied Section 554.19.2 of the 1950 Code of Iowa, and the applicable decisions of the Iowa courts thereunder, in determining the petitioners' status as agents or purchasers under Section 491, Title 7, United States Code.

4. The cases believed to sustain said jurisdiction are as follows:

Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 65 S. Ct. 895: 89 L. Ed 1296

O'Leary v. Brown-Pacific-Maxon, 340 U.S. 504, 71 S. Ct. 470, 95 L. Ed. 483

Pennsylvania R. Co. v. O'Rourke, 344 U.S. 334, 738, Ct. 302, 97 L. E. 367.

III. STATEMENT OF THE CASE.

1. **Nature of the Action:** Defendants were indicted for alleged criminal violation of the produce Agency Act, U.S.C., Title 7, Section 491. Indictment charged the defendants received two shipments of eggs for and on behalf of Richard Swalve, doing business as Swalve Produce Co., of George, Iowa (hereafter, Swalve), and failed truly and correctly to account for said eggs to Swalve.

2. **Nature of Defense:** One of the essential elements of a violation under Section 491 is that the produce must have been received by defendants *for or on behalf of another.* Defendants contended they did not receive the eggs for or on behalf of Swalve, but as purchasers from Swalve, as seller, and that the transactions involved were sales.

3. **The issues tried and how they were decided:** The issue was—Did the defendants receive the two shipments *for and on behalf* of Swalve, or were the transactions sales from Swalve to the Defendants. The Trial Court held this to be a question of fact for the jury and submitted it under Instructions 6 and 8½. The jury returned a verdict of guilty against both defendants.

4. **The facts disclosed by the evidence:** Richard Swalve, the Government's prosecuting witness, was engaged in the produce business at George, Iowa, as Swalve Produce Co. He shipped eggs to one David Schiller in Florida, and had given Schiller a written memorandum appointing Schiller his agent in Florida. (R. p. 13.) Schiller later proposed to the defendant, Herman Gross, that he enter the egg business and told Gross that Swalve was a source of supply. It was proposed that a corporation should be formed. Gross and Schiller came to Swalves' place of business in George, Iowa, in late July 1951. They told Swalve they were considering forming a corporation to be known as Quality Egg Shippers, Inc. (R. p. 7), and wanted to know if Swalve would ship eggs to the new corporation, and if so, at what price. (R. p. 36.)

Agreement on Shipments to Quality Egg Shippers, Inc.:

It was orally agreed at this meeting that Swalve

would ship eggs to the new company. The eggs were to be delivered in Miami and Quality was to pay Swalve a price to be computed in all instances at three and one-half cents per dozen less than the top quotation of the New York market price on the day of arrival in Miami (R. pp. 7, 14, 36, 37.) Quality was to deduct three and one-half cents per dozen, or $1.05 per case from the New York market. This $1.05 per case was to cover ninety cents for trucking (i. e., ice and taxes) and fifteen cents commission. (R. p. 7.) Quality was to send Swalve a check for the full amount of the eggs, less $1.05 per case. Quality was to take Swalve's entire output of top-grade and medium-grade eggs. Swalve started shipping under this oral agreement July 27, 1951, before the corporation was actually formed on August 7 or 8. He continued to ship under this agreement on the average of two loads per week until February 1952, during which period he received payment from Quality in the sum of $301,745.75 in checks drawn on the corporation. (R. p. 14, p. 20.) The price actually paid on all these shipments was three and one-half cents below the New York market on day of arrival in accordance with the agreement. (R. p. 37.) The method of operation was for Gross or Schiller to telephone Swalve when they wanted a load, specifying approximately how much of each grade. As soon as Swalve could get enough of each kind together, he would send the load to Miami by truck. (R. p. 7.) Upon arrival in Miami, the eggs were delivered to Quality's place of business. Some loads were delivered to Quality's customers the same day in door to door deliveries from the same truck.

Other loads were unloaded into Quality's cooler to be sold by Quality to its customers at later dates.

Other loads were partially delivered to Quality's customers on the day of arrival, and the balance was unloaded in Quality's cooler to be sold later. Some eggs from Swalve remained in Quality's cooler as long as four or five weeks. Quality would not wait until it had sold or disposed of the eggs before it would pay Swalve. (R. pp. 2, 4, 25, 37.) The payments were to be made within a reasonable time after arrival in Miami, which Swalve considered to be at least seven days. (R. p. 15.) Quality had to pay Swalve three and one-half cents under the market, regardless of what Quality did with the eggs. Swalve was guaranteed that price in every case. Quality had the right to speculate on the eggs. If the market went up after delivery in Miami, Quality would make a profit; if the market went down, Quality would take a loss. Quality could sell the eggs immediately, or hold them as long as it wanted to. (R. pp. 14, 15.) At times Swalve was paid for eggs before they were resold by Quality. (R. last paragraph p. 37, p. 38.) Quality actually took losses on some eggs purchased from Swalve, selling them at less than the price paid Swalve. (R. p. 42.) In at least one instance, Quality was never paid at all by one of its customers for eggs for which Quality had paid Swalve. Quality stood the loss. (R. p. 45.) Swalve testified he had received a full accounting and payment for all shipments except the two loads named in the indictment, which were the last two loads shipped by him to Quality. (R. p. 14.)

A new price was negotiated between Swalve and Quality in February 1952. Gross told him competion was keen, and Quality would have to have more commission. Swalve agreed to an extra quarter cent commission, or discount, which made the price to Quality, three and

three-quarters cents below the New York market on date of arrival. (R. p. 14.) No change was made in the oral agreement other than price. The two shipments named in the indictment were then sold under this new price. (R. p. 15.) The first left George February 22 or 23, 1952, arrived in Miami February 26, and the entire load was sold to customers of Quality the same day. (R. p. 45.) The second left George March 1, 1952, arrived in Miami March 5 and was gradually sold by Quality to its customers on March 5, 10, 11, 13, 17 and 19. (R. p. 46.) Swalve in George and Quality in Miami independently computed the amount due on these two loads on the basis of the agreed price of three and three-quarters cents less than the New York market. Their totals were within seven cents of each. Quality figured $12,003.15 to be due on the two loads. Swalve figured $12,003.08 as shown on Exhibits C and D in Swalve's own handwriting. (R. pp. 8, 45.) Swalve has never received payment for these two loads which are named in the indictment. (R. p. 8.)

Agreement on direct shipments to Florida outlets other than Quality Egg Shippers, Inc.:

At the time of the original conference between Swalve, Gross and Schiller at George in July or August, 1951, they also made an agreement concerning direct shipments to outlets in the State of Florida other than Quality Eggs Shippers, Inc.

If Quality obtained orders for eggs to be shipped direct from Swalve to other customers in the State of Florida, Quality was to be paid a commission on one-half cent per dozen on all such direct shipments. (R. p. 13, p. 15, p. 36 and first 8 lines p. 37.) Swalve testified the

only direct orders ever obtained by Quality were four shipments to June Dairy, a retail egg company in Miami, made during the first month and one-half after July 1951. These four loads were shipped direct to June Dairy, which remitted the full purchase price direct to Swalve. Swalve admitted he had never paid Quality the one-half cent commission, which it was entitled to on these four direct shipments. (R. p. 13.)

Quality contended Swalve owed it commissions for other direct shipments in addition to the four to June Dairy. (R. p. 15.)

5. **Proceedings at trial which gave rise to appeal:** At the close of the plaintiff's evidence and again at the close of all the evidence, defendants moved for a judgment of acquittal on the ground that the court should hold the transactions were sales as a matter of law. (R. pp. 29, 46.) Both motions were overruled by the trial judge. Motions for acquittal urging the same grounds were filed following the trial and were overruled by the trial judge. The same grounds were urged in points 3, 5 and 6 of the defendants' joint motion for new trial which was overruled by the trial judge.

6. **Opinion of appellate tribunal which gave rise to certiorari:** The majority opinion admitted that the eggs involved could have been sold to the defendant corporation. (R. p. 81.) The opinion itself does not cite or rely upon any applicable Iowa statute or decisions (R. p. 80- 84); it completely disregards the testimony of O. N. Harsha, a marketing specialist of the United States Department of Agriculture, the employee of the Secretary of Agriculture of the United States, the public official charged

with enforcing Section 491, Title 7, United States Code (R. p. 32-35). The testimony offered by said witness, the only expert witness appearing, was offered to clarify usages of the egg trade in conformance with the applicable Iowa statute. Thus the appellate tribunal disregarded the function of the Secretary of Agriculture and the applicable Iowa statutes.

IV. SPECIFICATION OF ERRORS.

1. The trial court erred in its failure to enter a judgment of acquittal for the petitioners by misinterpreting the uncontroverted and undisputed facts and in applying the pertinent Iowa statute and decisions thereunder.

2. The appellate tribunal erred in affirming the trial court by completely overlooking the evidence offered by the Executive Department, i.e. Department of Agriculture, who, by statute, is charged with enforcing Title 7, Section 491, United States Code.

ARGUMENT

Summary of the Argument

Point A

In determining whether the defendants received eggs for and on behalf of Swalve, the Federal Court will follow the Iowa law.

In re Heckathorn, 144 Fed. 499, at p. 502, lines 1-12.

In re Morris, 156 Fed. 597 at p. 598.

Point B

The evidence shows that defendants did not receive the eggs for and on behalf of another and that the transactions involved were sales. The evidence presented no question of fact on this point. The court should have sustained a motion for acquittal on the ground that the transactions were sales; and the defendants, therefore, were not guilty as a matter of law.

Norwegian Plow Co. v. Clark, 102 Ia. 31, 78 N. W. 808.

Norton v. Fisher, 113 Ia. 595, 85 N. W. 801.

Hull-Dobbs Motor Co. v. Associates Corp., 241 Ia. 1365, 44 N. W. 2nd 403.

Holbert v. Keller, 161 Ia. 723, 142 N. W. 962.

Point A

In determining whether the defendants received eggs for and on behalf of Swalve, the Federal Court will follow the Iowa law.

In determining whether the defendants received the two shipments of eggs for and on behalf of Swalve, or whether the transactions were sales, the Federal Court will follow the statutes of Iowa governing the transactions and decisions of the Iowa Supreme Court.

The following Federal cases hold that whether a transaction is a sale or a bailment is a question of local law in which the decisions of the State Courts control.

In re Heckathorn, 144 Fed. 499, at p. 502, lines 1-12.

In re Morris, 156 Fed. 597 at p. 598.

Point B

The evidence shows that defendants did not receive the eggs for and on behalf of another but that the transactions involved were sales. The evidence presented no question of fact on this point. The Court should have sustained a motion for acquittal on the ground that the transactions were sales; and the defendants, therefore, were not guilty as a matter of law.

1. Introduction—Contracts of Sale as distinguished from Contracts of Agency.

Were the transactions named in the indictment contracts of sale or contracts of bailment, consignment or agency? In considering how to distinguish contracts of sale from contracts of agency, it is believed the Court will find the following annotation to be helpful:

> "Construction of Contract having some provisions peculiar to consignment and agency contracts, and others to sale contracts." (1917B L. R. A. 626.)

Reviewing decisions from many jurisdictions, the author states that in determining whether a contract is one of

sale or of agency, the courts will seek to gain a definite conception of the intention of the parties. (p. 626.) However, the intention of the parties cannot control where to give it effect would be violative of the principles of law applicable to contracts of sale or of agency. The intent is governed and controlled by the actual results accomplished by the contract. Since the actual results of the contract control in its construction, the real question is as to the relation established between the parties by the contract, and this question is usually one of law. The parties cannot change the real character of the contract by designating or agreeing as to its character, and it matters little what they style the agreement. There is no magic in the words "agency," or "commission" which are often used in contracts where the real relationship between the parties is that of seller and buyer. (p. 627.) Whether the contract creates the relationship of principal and agent, or seller and buyer depends upon the following controlling provisions:

(a) Imposition upon consignee of obligation to pay the purchase price. (p. 630—an essential element of a sale.)

(b) Retention by consignor of title to proceeds of sale. (p. 638—a leading feature of an agency contract.)

(c) Restrictions upon right, manner and terms of resale. (p. 645—these are inconsistent with a sale.)

(d) Provision for return of unsold goods. (p. 646—strongly indicates a bailment.)

A more recent discussion of such controlling provisions is at 63 A. L. R., pages 364 to 384 under the heading:

"III. Character of contract as one of sale, absolute or conditional, or one of consignment."

See also 47 Am. Jur. 837 (Sales) at page 827, which states that in determining whether a contract is one of sale or consignment, the Courts employ the following tests:

(a) Who has title to the proceeds of the resale?

(b) Whether there is an obligation to pay for the goods received.

(c) Who fixes the price at which the goods are to be resold?

(d) Whether there is a right to return, or demand the return of the goods.

2. Controlling provisions adopted by the Iowa Supreme Court in distinguishing contracts of sale from contracts of agency.

We have been unable to find any single comprehensive analysis of the Iowa decisions distinguishing contracts of sale from agency transactions. However, a review of the cases shows that the Iowa Supreme Court considers certain key provisions to be controlling in making such determinations; and, in general, the decesions are in accord with the criteria set forth in the annotations at 1917B L. R. A. 626 and 63 A. L. R. pages 368 to 384. The Iowa Court has given great weight to the following contract

provisions in distinguishing sales from agency transactions:

(a) Imposition upon consignee of obligation to pay purchase price:

This appears to be the most important of all provisions stressed by the Iowa Court. In each of the following cases the court relied on such a provision in construing a contract to be a sale rather than a bailment:

Norwegian Plow Co. v. Clark, 102 Ia. 31, 78 N. W. W. 808:

> "One of the principal tests by which to determine the question is, was there a binding promise on the part of the consignee to pay for the goods. If there was such a promise the contract is ordinarily held to be one of sale and not of bailment."

Norton v. Fisher, 113 Ia. 595 at page 596, 85 N. W. 801:

> "The most approved test to be applied to such contracts lies in ascertaining whether there was a promise to pay for the goods. If so, as a general rule, the transaction will be declared a conditional sale rather than a bailment. Here there was an explicit agreement to buy at a fixed price."

Hull-Dobbs Motor Co. v. Associates Corp., 241 Ia. 1365, 44 N. W. 2nd 403:

> "The most infallible test for determining under

which class the contract falls is to ascertain whether there is a promise by the purchaser to pay for the goods delivered. If there is such a promise, then no matter under what form the transaction is disguised, it is held to be a conditional sale and not a bailment. Citing *Hansen v. Kuhn*, 226 Ia. 794, page 797; 285 N. W. 249, page 252; *Bentley v. Snyder*, 101 Ia. 1, 69 N. W. 1023."

(b) Retention by consignor of title to goods or to proceeds of sale:

In Iowa, as in other jurisdictions, such a provision negatives a sale, and a failure to include such a provision indicates a sale.

For example, in *Checkrower Co. v. Bradley*, 105 Ia. 537, 75 N. W. 369, the Court stated:

> "There is nothing in the contract that defendant was to sell in the name of the plaintiff, *nor that title to the corn cutters should remain in the plaintiff*, and the warranty indicates that an agency was not contemplated." (Emphasis ours.)

Similarly in *Holbert v. Keller*, 161 Ia. 723 at page 737, 142 N. W. 962, the Court emphasized a provision which "expressly stipulated that Holbert retains the title to the property in himself" as negativing a sale.

(c) Restrictions upon right, manner, and terms of resale:

The Iowa Court has uniformly held that such re-

strictions are inconsistent with a sale and that the failure to impose such restrictions is inconsistent with an agency transaction.

> "If it was a sale, the plaintiff would have no authority to fix a minimum price at which the consignees were authorized to sell the horses. *Holbert v. Keller*, 161 Ia. 723 at page 740, 142 N. W. 962."

"The exercise of acts of ownership" by the consignee was emphasized in another case as follows:

> "Defendant not only paid the freight and took possession of the loaders but advertised them for sale and actually sold one of them. * * * Advertising the loaders for sale and selling part of them was entirely inconsistent with the continuance of the right to the property in the vendor." *Plow Co. v. Meredith*, 107 Ia. 498, 78 N. W. 233.

In a more recent decision holding a transaction to be a sale, the Iowa Court emphasized the dominion and control granted to the buyer as follows:

> "That c ompany had possession, dominion and control of the property, to do with it as it pleased. It accepted the property on December 31, 1941, and had possession and control over it every day thereafter. It made sales from the stock on the premises. It packed, crated and removed the remaining property to Kenosha. The plaintiff had no possession of the property after December 31. It had no title to or ownership in the property thereafter. It did not retain naked title even as security. It exercised no do-

minion or supervision over the property." *Cownie v. Local Board of Review*, 235 Ia. 318, 16 N. W. 2nd 592.

(d) Provision for return of unsold goods:

In Iowa, as in other jurisdictions, such a provision is inconsistent with a sale and strongly indicates a bailment. The omission of such a provision indicates a sale.

> "The distinction between an agency contract and a sale is not always clear. * * * Perhaps the most usual and most reasonable rule is that, if by the terms of the contract the consignor or owner retains a right to demand a return thereof at any time without default on the part of the person to whom it is delivered, the transaction is to be held one of bailment or agency and not of sale. Citing *In Re Flanders*, 134 Fed. 560;" *Holbert v. Keller*, 161 Ia. 723 at page 738; 142 N. W. 962.

The Court relied upon a provision whereby consignees "were to have the right to return the unsold machinery instead of purchasing it" in holding consignees to be mere commission agents in *Warder v. Hoover*, 51 Ia. 491 at page 593, 1 N. W. 795.

A similar provision was apparently relied upon by Judge Reed in a case reported from the Northern District of Iowa, *In Re Kruse*, 234 Fed. 470, where the contract provided the agent was "to hold the property so received as agent for the Acme Company until sold, and to return to that company on demand any of the property not sold during the term of the agency." (last 4 lines,

p. 473.) In a very brief opinion, the Court held the contract to be a bailment and relied on the following four decisions, each of which stresses that provisions giving consignor the right to return unsold goods indicate consignment rather than sale.

Ludvigh v. American Woolen Co., 231 U.S. 522, 34 Sup. Ct. 161, 58 L. Ed. 345.

Sturm v. Boker, 150 U.S. 312, 14 Sup. Ct. 99, 37 L. Ed 1093.

John Deere Plow Co. v. McDavid, 137 Fed. 802, 70 C.C.A. 422.

In Re Columbus Buggy Co., 143 Fed. 859, 74 C.C.A. 611.

3. The undisputed evidence shows the transactions were sales and defendants received as buyers and not for or on behalf of Swalve.

The only agreement between Swalve and defendants which is material in this case is the agreement concerning shipments from Swalve to defendants. While it is true an agreement was also made concerning shipments from Swalve direct to Florida outlets other than Quality, such agreement is not material because the indictment specified that the eggs in the instant case were shipped from Swalve to defendants and the evidence so shows. Hereafter "the agreement" refers to the agreement concerning shipments from Swalve to defendants. Defendants contend that there is no dispute in the evidence as to the terms of the agreement or as to the course of dealings

under such agreement and are willing to accept the testimoney of the prosecuting witness Swalve on both points. Swalve testified the agreement was oral and was made in late July 1951. Quality was to take its entire output of top-grade and medium-grade eggs and to pay him a price to be computed in all instances at three and one-half cents per dozen less than the top quotation of the New York market price on date of delivery in Miami. (R. pp. 7, 14.) He was guaranteed that price regardless of what Quality did with the eggs. Quality had the right to speculate on the eggs, to sell the eggs at a profit, or loss, if the market went up or down after delivery. Swalve had no control over the eggs after they were delivered to defendants in Miami. "As long as they lived up to their agreements with me (to pay the agreed price) I didn't care what they done." (R. p. 14.) Swalve further testified that he shipped $301,745.75 worth of eggs to defendants pursuant to this agreement from August 1951 to February 1952, and that in every instance he received the full agreed purchase price of three and one-half cents below the New York market in checks drawn on Quality Egg Shippers, Inc.

Then in February, 1952, he negotiated a new agreement with Quality about the price, granting Quality an additional one-quarter cent discount, so that the price would be three and three-quarters cents below the New York market date of arrival in Miami. There were no other changes in the agreement. He then went ahead and sold the two shipments named in the indictment under the new price. (R., last 9 lines p. 7, p. 15.)

Swalve further testified that he went ahead and sold the two shipments named in the indictment (R. p. 15, lines

17-19) and further that he broke off business with them March 1, the last load sold to them (R. p. 15, lines 26-28), and admitted the execution and the forwarding of Exhibit 52-B (R. p. 19) wherein he admitted the defendants bought the eggs involved in the indictment from him and further admitted the execution of Exhibit 56-A (R. p. 21) wherein he referred to the transactions between the parties prior to any difficulties as sales.

The language is important in view of the fact that the United States Circuit Court of Appeals for the Eighth Circuit enunciated the general applicable law so succinctly stated in the dissenting opinion by Chief Justice Gardner in relying upon *Terry v. Miller*, 190 Fed. 2d 170 (8th Circuit) and *Craig v. Thompson*, 177 Fed. 2d 457 (8th Circuit), (R. p. 85, 87.) Thus testimony offered by a prejudiced, angry, prosecuting witness still referred to the entire transactions between himself and the defendants as sales.

This testimony has far more reaching effect offered in this light than interpretations placed upon it by the majority opinion which seeks to beg the question on the basis of fact to be decided by a jury, although it concedes that a sale was possible (R. p. 81, paragraph 3).

It therefore seems, where a criminal statute is involved, that the majority overlooks the necessity of the proof of guilt beyond a reasonable doubt and admits that another determination could have been reached or inferred (R. p. 81).

Turning to the testimony of the witnesses, Hilditch, Koger, Decker and of the defendant, Herman Gross, there

is again no dispute as to what happened to the eggs after they were delivered in Miami in accordance with the agreement. Some were resold by the defendants immediately upon arrival in Miami, but defendants had a right to hold eggs as long as they wanted to. Some eggs were kept by Quality in its coolers for four or five weeks before resale. When eggs were not resold immediately, Quality paid Swalve before the resale. (R. p. 37.) Sometimes defendants actually sustained losses on the resale of eggs purchased from Swalve. (R. pp. 42, 45.) Nor is there any dispute as to the amount due Swalve on the two loads named in the indictment.

Testimony of the witness, O. N. Harsha, is important in showing that under the usages of the egg trade, defendants could only be dealers and had none of the identifying characteristics of commission men who received for or on behalf of another. Harsha qualified as an expert, who could testify on usages of the egg produce trade. Such usages are relevant because Section 554.19.2 of the 1950 Code of Iowa, the Uniform Sales Act, states:

> "For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, *usages of trade* and the circumstances of the case." (Emphasis ours.)

Harsha, an employee of the United States Department of Agriculture for twenty-four years, has had the duty of investigating complaints filed by egg shippers under four stattues, including the Produce Agency Act, and now reviews evidence developed in investigations all over the United States. (R. pp. 32, 33.) His testimony as to the meaning of the following terms in the egg produce

trade was uncontradicted by any other evidence in the case. Harsha testified the term "dealer" has a definite meaning in the egg trade. A dealer is a man who buys eggs and then sells them in anticipation of a profit. He may sustain a loss, but they are his eggs to do as he pleases. He buys the eggs at a definite price, and the price paid to the original shipper does not depend in any way on what the dealer is able to get for them. (R. p. 34.) All the above criteria apply to the defendants in the instant case, and it is clear from the undisputed evidence that the defendants exactly fit the definition of "dealer." Harsha also testified that the term "commission man" has the following definite meaning, none of which is applicable to the defendants in the instant case under the undisputed evidence:

> "This man or merchant receives eggs and he sells the eggs for what he can get for them. He receives the particular shipment of eggs from a consignor. He sells the shipment for as much money as he can * * * and he deducts therefrom his fee. It is a cent or two cents, depending upon the locality, and his ability to make quick sales, and if the transportation charges are paid at destination, those charges are paid by the commission merchant out of his deduction for handling and the net sum that is left is remitted to the consignor. * * *
>
> "A commission man's fee does not depend on the amount for which the shipment is sold at the other end. * * * (R. p. 33.)
>
> "When eggs are handled by a commission man or broker for a shipper, it is not customary for the shipper to be guaranteed a price. * * *

"When eggs are handled by a commission man it is not the custom of the trade for the buyer and seller to have a specific price in mind ahead of time.

"When a commission man handles a shipment for the original shipper, it is the custom of the trade for the price to the shipper to depend entirely on what price the commission man gets for it." (R. p. 34.)

It is clear from the above definitions that the defendants were not commission men, as contended by plaintiff, but were dealers who bought the eggs from Swalve at a definite price.

It is further important to evaluate this testimony in the light of the party offering the same. Under another provision of the statute under which the indictment was founded the Secretary of Agriculture is directed and authorized to *enforce* the act (Emphasis ours). Section 493, Title 7, United States Code.

It is true that the remainder of the provision directs all United States attorneys to prosecute cases arising thereunder, subject to the supervision and control of the Department of Justice. Section 493, Title 7, United States Code. In this instance there appears to be a dire conflict between the enforcement agency and the prosecuting authority wherein credence to the argument stated in the dissenting opinion should be well considered.

"The case, in fact, has some of the ear-marks of a criminal proceeding brought to recover a debt rather than for the enforcement of a law enacted

for the protection of the public." Dissenting opinion, Chief Justice Gardner (R. p. 88.)

When the foregoing is read in the light of the judgment entered as to the defendant, Herman Gross, wherein the condition of probation is dependent upon the discharge of civil judgment to be entered by a state tribunal (R. p. 65), it definitely appears that the dissent grasps the nature and the temperament surrounding the trial of the cause.

4. No question of fact remained for the jury, and the court should have held the transactions to be sales as a matter of law.

The following Iowa decisions are authority for the proposition that the Court should take the case from the jury where, as in the present case, there is no dispute in the evidence as to the provisions of the contract.

Norwegian Plow Co. v. Clark, 102 Ia. 31, 78 N. W. 808.

Here the principal question was whether the contract was one of bailment or sale. The Supreme Court held the construction of the contract was a question of law and not of fact and reversed the trial court, construing the contract to be one of sale.

Norton v. Fisher, 113 Ia. 595, 85 N. W. 801.

In this case the only issue was whether the defendant held property as plaintiff's agent or as the owner under a conditional sale. The court affirmed a directed

verdict for the defendant, holding the transaction a sale.

In *Hull-Dobbs Motor Co., v. Associates Corp.*, 241 Ia. 1365, 44 N. W. 2nd 403, the Court stated:

> "Where the facts are not in material dispute, the interpretation placed thereon by the trial court becomes a question of law and is not conclusive on appeal. (citing cases) We deem the issue before us (whether or not a contract was a conditional sale or merely an agreement to make a contract) to be one of law."

In *Bishop v. Starrett*, 201 Ia. 493, 207 N. W. 561, one of the disputed questions was whether the contract was a conditional sale or a sale on delivery. The court stated:

> "The contract being in parol, what its terms were would clearly be a question for the jury, *if the testimony was in conflict.*" (Emphasis ours.)

It would follow that where, as in the instant case, the testimony is not in conflict there should be no question for the jury, and the court should have granted the motions for acquittal. Other cases upholding directed verdicts in cases involving the construction of contracts of sale are:

Rudy Patrick Seed Co. v. Roseman, 234 Ia. 597, 13 N. W. 2nd 347.

Semple v. Northern Lumber Co., 142 Ia. 586, 121 N. W. 23.

Rhynas v. Keck, 179 Ia. 422, 161 N. W. 486.

The following statement appears in the discussion of how to determine whether a contract is one of sale or agency in the annotation at 1917B L. R. A. 627 at page 627:

> "Since the actual results of the contract control in its construction, the real question is as to the relation established between the parties by the contract, and this question is usually one of law to be determined from all its provisions."

CONCLUSION

The controlling provisions of the agreement and the course of dealings under the agreement are consistent only with a sale. These provisions were as follows:

1. The defendants were obligated to pay a definite purchase price. This price was actually paid to Swalve in every instance up until the two loads named in the indictment, and there is no dispute as to the price and amount due on those two loads.

2. Swalve did not reserve title to the goods or to the profits of sale.

3. Absolutely no restrictions were imposed upon the right, manner or terms of resale by the defendants. Swalve surrendered all further control over the goods after delivery in Miami.

4. There was no provision for the return to Swalve of unsold goods.

5. The defendants' profit depended entirely upon the price for which they were able to resell to their own customers. The price to Swalve did not depend in any way on the defendants' sale price to defendants' customers. The defendants had a right to speculate and did speculate on eggs received from Swalve, making profits and taking losses.

All the above provisions show the transactions were sales, and the defendants received as buyers from Swalve and did not receive for or on account of Swalve. There being no dispute in the evidence that such were the controlling provisions of the contract, the court should have held as a mater of law that the transactions were sales, that defendants, therefore, did not receive the eggs for or on behalf of another, an essential element of the crime charged, and the court should have sustained motions for judgment of acquittal in behalf of both defendants.

Further the apparent discrepancy between the enforcement agency and the prosecuting authority of the United States of America appears to present a problem calling for the exercise of this Court of its supervisory powers to establish a basis for the future enforcement of the applicable statutes to prevent a re-occurrence of the utilization of the criminal processes of the United States of American for the collection of a debt.

It is therefore respectfully submitted that this case is one calling for the exercise of this Court of its power to rectify an apparent error in the application of State

statutes and decisions thereunder by a United States District Court and the permission thereof by a United States Circuit Court of Appeals, and by further supervising the proper administration of justice in said courts by granting a writ of certiorari and thereafter reviewing and reversing said erroneous decisions.

Dated June 22, 1954.

_____Attorney for Petitioners

Service of the foregoing petition for writ of certiorari and brief in support thereof, together with the record of the cause in the United States Court of Appeals for the Eighth Circuit was had on this_____day of June, 1954, by forwarding the same to the Solicitor General of the United States Department of Justice, Washington, D. C. by air express.

_____Attorney for Petitioners

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 158

QUALITY EGG SHIPPERS, INC., AND HERMAN GROSS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 79) is reported at 212 F. 2d 417.

JURISDICTION

The judgment of the Court of Appeals was entered on April 23, 1954 (R. 88, 89). On May 20, 1954, Mr. Justice Clark granted an extension of time for the filing of a petition for certiorari until

June 22, 1954 and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether the evidence supports the verdict which imports a finding that petitioners received egg shipments as agents and not as purchasers.

STATUTE INVOLVED

7 U. S. C. 491 provides in pertinent part:

> * * * any person * * * or corporation receiving any fruits, vegetables, melons, dairy, or poultry products * * * in interstate commerce, * * * for or on behalf of another * * * who shall knowingly and with intent to defraud fail truly and correctly to account therefor shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than $100 and not more than $3,000, or by imprisonment for a period of not exceeding one year or both, at the discretion of the court.

STATEMENT

In the District Court for the Northern District of Iowa, a jury found petitioners guilty on both counts of an indictment charging violations of 7 U. S. C. 491, by receiving certain shipments of eggs in interstate commerce and knowingly and with intent to defraud failing to account for the eggs (R. 63, 64, 65). The corporate petitioner was

fined a total of $1,000 (R. 63, 64). Petitioner Gross was sentenced to six months imprisonment on each count, the sentences to run concurrently, was placed on probation for three and one-half years, and was fined a total of $1,000 (R. 65). The judgment was affirmed on appeal, one judge dissenting (R. 88).

Petitioners' sole contention is that the record shows conclusively that they received the eggs as purchaser-owners and not as agents of the prosecuting witness, and that accordingly the trial court should have directed an acquittal. The evidence may be summarized as follows:

Under an oral contract, the prosecuting witness, Richard Swalve, shipped from George, Iowa, to defendants in Miami, Florida, two truck loads of eggs of the approximate value of $12,000, for which petitioners failed to account (R. 7, 8, 45, 46). Swalve testified that he had appointed one Schiller as his Florida agent prior to the organization of Quality Egg, Inc. (R. 13); that in July 1951 petitioner Gross and Schiller came to his place of business in Iowa and arranged that eggs thereafter be shipped to them as a company on a deal "similar to the deal I had previous to that and the deal was that they were to handle these eggs for me" (R. 7, 71). The arrangement was that petitioners were to remit to Swalve 3½ cents per dozen less than the New York market price on the day of arrival of each shipment in Miami (R. 7). Swalve referred to the portion of the differential which accrued to petitioners after payment of trucking charges by petitioners as

their commission (R. 15, 16, 26, 72, 73), and considered petitioners his agents (R. 13). He testified that the first load shipped on July 27 or 28, 1951 (before actual formation of the corporation) was abandoned by the trucker; that petitioners sold it as distress merchandise and that he stood the loss (R. 13). He said that petitioners generally had sold the eggs before arrival in Miami (R. 14). He also testified that in addition to the arrangements for shipping to Quality Egg, Inc., he agreed with them to pay a commission on all orders for eggs which they obtained from other outlets in Florida (R. 13). Truckers who delivered the eggs to Miami testified that the usual practice was for them to deliver the eggs to various wholesale houses immediately upon arrival in Miami. On such deliveries the trucker was accompanied by a man from Quality Egg Co., who directed the distribution as on a "milk route" (R. 2, 4, 25). On cross-examination, Swalve expressed conclusions as to the legal effect of the arrangement with Quality Egg, Inc., which gave it some of the marks of a vendor-vendee rather than a principal-agent relationship (R. 14-15); on redirect he testified that the terms "buy" and "sell" are used to indicate agency relationships as well as actual sales (R. 16).

The testimony of Gross was to the effect that there were two separate relationships, *i.e.*, the obtaining of other customers in Florida was a commission arrangement, whereas Quality Egg's own reception of eggs was as a purchaser (R. 36, 37);

that Quality Egg sometimes paid Swalve for the eggs before they had disposed of them (R. 37); that on occasion some of the eggs were not immediately delivered to outlets on arrival in Florida and some were accordingly put in Quality's cooler (R. 37); that on one occasion his company lost approximately $150 by selling some eggs for less than the amount already remitted to Swalve (R. 42); and on another occasion one customer failed to pay Quality the full amount owed, after Quality had remitted to Swalve (R. 45).

Swalve testified that petitioners gave as the reason for not remitting for the two loads named in the indictment the claim that Swalve owed them commissions on eggs shipped directly to many customers in Florida; that in an effort to obtain payment for the two loads he agreed to pay commissions on direct shipments which he claimed he did not owe petitioners, but that Gross refused to pay for the two loads unless Swalve would execute a written contract making petitioners the exclusive Florida outlet and agreeing to a commission to petitioners on all eggs shipped into the state of Florida. Witness Dykstra supported this testimony (R. 25, 74, 75, 76).

One Harsha, an agricultural expert testified for the defense as to the differences between dealers, who bought eggs, and agents who acted for others (R. 32, 33, 34).

ARGUMENT

The trial judge, under careful instructions (R. 55-56), submitted for the jury's determination the

issue of whether the contract was one of sale or of agency. Petitioners' contention that this was error, because the evidence conclusively established a sale, is without merit.

As the majority of the court below held, there was sufficient conflict in the testimony and there were sufficient indicia of a brokerage relationship to warrant submission of the issue to the jury. Petitioners' reliance on Iowa law is misplaced, for the cases they cite (Pet. 19-24) indicate that the determination of whether a particular agreement is one of sale or of bailment depends on the particular facts presented by each case. Those cases in which the facts are closest to petitioners' situation held the relationship there involved to be consignments for sale. *Holbert* v. *Keller,* 161 Iowa 723; *Norton* v. *Fisher,* 113 Iowa 595; cf. *Union Stock-Yards & Transit Co.* v. *Western Land and Cattle Co., Ltd.,* 59 Fed. 49 (C. A. 7). The controlling rule in Iowa is the familiar one that conflicts of evidence as to the provisions of a parol contract are jury questions, and that the words and conduct of the parties must be weighed to determine their intent. *Bishop* v. *Starrett,* 201 Iowa 493; *Bash* v. *Hade,* Sup. Ct., Iowa, 55 N. W. 2d 278. The issue presented goes merely to the inferences to be drawn from the evidence and presents no question warranting review by this Court.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
JOSEPH A. BARRY,
Attorneys.

JULY 1954.

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